United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

74-2380

To be argued by
WILLIAM EPSTEIN

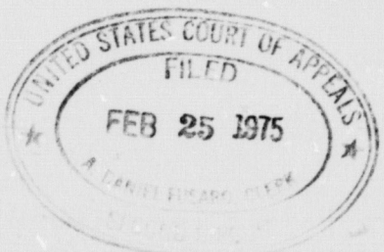
B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ELDEN TURCOTTE and FORREST GERRY, JR., Appellants.	Docket No. 74-2408 Docket No. 74-2380

SUPPLEMENTAL BRIEF FOR
APPELLANT ELDEN TURCOTTE

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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I

THE CHARGE ON OBSTRUCTION OF JUSTICE AND CONSPIRACY TO DO THE SAME WAS ERROR.

At trial, Judge Platt ruled that the Government could introduce evidence of the recent massive Superfecta fix scandal. The Judge overruled strenuous objection by defense counsel, stating quite incorrectly that the evidence was proper "background" for the present case because of the substantial involve-

ment in the Superfecta case by the co-defendant, Gerry, and the cooperating witness, Kraft (145-147). In the course of the colloquy on the admissibility of this evidence, it was agreed that appellant played no role in the Superfecta fix and that the present case was derived from facts independent of the Superfecta wrongdoings.

Notwithstanding his own order limiting use of the Superfecta fix facts to that of background, and his own belief that appellant was not involved in that scheme, Judge Platt inexplicably instructed the jury that appellant was charged in the obstruction of justice and conspiracy counts with participation in the Superfecta fix scheme, and that he could be convicted premised on that participation:

> Now, with respect to the second count of the indictment, attempted obstruction of justice, and the third count of the indictment, conspiracy as aforesaid, there are two parts to the Government's charge as to attempt to obstruct justice and conspiracy to attempt to obstruct justice, the first pertaining to the ownership of horses and the second pertaining to the conspiracy to fix races. With respect to the first of such parts pertaining to the ownership of horses, the Government points to the conversation between Turcotte, Gerry, and Kraft on August 19, 1973 and certain other evidence in the case. If you find the elements of one of the other or both of the charges proved beyond a reasonable doubt as to such parts as to a defendant or both of them, then you must convict such defendant or both of them, as the case may be, on the count or counts so proved; otherwise, in each case you must acquit.
>
> (1214).

This instruction is explicit in permitting the jury to

consider against appellant on two of three counts in the indictment evidence of "conspiracy to fix races" and to convict appellant of obstruction of justice "if you find the elements of one or the other or both of the charges." Thus, since the jury might have convicted appellant of obstruction of justice and conspiracy based upon wrongful acts he unquestionably did not commit, and which were not charged against him or Gerry in this indictment, the conviction must be reversed. Cf., United States v. Rosenstein, 434 F.2d 640 (2d Cir.), cert. denied, 401 U.S. 921 (1970).

Counsel for Turcotte made no objection to this instruction. However, counsel for co-defendant Gerry did object to this instruction. Judge Platt initially denied having given the challenged instruction, and even refused to check his notes to verify whether counsel's memory was correct. Accordingly, since the error was brought to the Judge's attention and he refused even to acknowledge its existence, it cannot be said that Turcotte's counsel's failure to object prevented the Judge from correcting his error.

Further, this error was substantial because appellant was innocent of horse race fixing, but the jury was told it could nonetheless convict him.

II

THE CHARGE ON THE ELEMENT OF KNOWLEDGE OF FALSITY WAS SUBSTANTIAL ERROR REQUIRING REVERSAL OF THE JUDGMENT.

Judge Platt also erroneously instructed the jury with respect to the perjury count. He stated:

> ... The question of his state of mind is an issue to be found by the jury. It is hard to determine from direct testimony, but it can be inferred from things the defendant says or does. As a practical matter, it is almost impossible to prove the workings of a defendant's mind when he testified before the Grand Jury, but in appropriate circumstances, as here, you may infer a belief in the falsity by proof of the falsity itself, if you have found this falsity to have been so proved beyond a reasonable doubt.
>
> You don't have to make such an inference, but if you find the testimony was false when given before the Grand Jury, you may find the third element, that the testimony, if you decide it was given falsely, was given knowingly and wilfully.

(1199).

This instruction was erroneous because, on the facts of this case, such an inference was impermissible. By cross-examination of government witnesses and Gerry, Turcotte's lawyer brought out substantial uncontroverted evidence showing that Turcotte was ignorant of any agreement between Gerry and Kraft. Further, the evidence revealed that all the transactions involving the horses were conducted in the normal and usual way such transactions were carried out. Thus, there was no reasonable relationship between the single fact of falsity and knowledge of the falsity.

If the Judge wanted to instruct the jurors as to how they were to consider the element of knowledge, he should have told them that knowledge was to be determined from the totality of the circumstances in the case. He need not have outlined any of the circumstances, leaving that for the jurors, but if he chose to list the relevant factors, he should have included the evidence that all transactions involving the horses were handled in the normal course of business in the trade, that appellant Turcotte had authority to act as trainer-driver for the horses, and that appellant was not privy to many conversations between Gerry and Kraft relating to the horses, as well as the fact of falsity.

Instructing the jurors that they might find knowledge from falsity alone had the effect of removing from the case other circumstances relevant to knowledge. Although no objection was made at trial to this instruction, this Court should recognize the instruction as plain error, pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, because the instruction misled the jury on an element of the crime. United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973); United States v. Fields, 466 F.2d 119, 120 (2d Cir. 1972).

CONCLUSION

For the foregoing reasons and the reasons set for in the main brief for appellant Turcotte, the judgment below must be reversed and the District Court instructed to enter a judgment of acquittal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Feb. 13, 1975

I certify that a copy of this supplemental brief has been mailed to the United States Attorney for the Eastern District of New York and to the Department of Justice P.O. Box 899, Washington, D.C. 20044.

Phyllis Slavet Bamberger